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Utah Lake, the largest freshwater lake in the third driest state, is a vital, yet underappreciated natural resource. In 2018, the Utah State Legislature passed the Utah Lake Restoration Act in an attempt to restore and enhance the lake's ecological and recreational value. Yet the new law has been met with strong public resistance because it leaves the lake vulnerable to exploitation and further ecological degradation, a concern made real by a proposed development plan that would build a city of islands on top of the lake. Community members cite specific concerns about threats to native species, disruption of water rights, and burdens on local taxpayers. But such a plan also presents potential legal issues as the scheme likely violates the public trust doctrine. A legal doctrine with historic roots, the public trust doctrine asserts that the public has a right to the beneficial use of lands underlying navigable waters. The state, as trustee, has an inalienable responsibility to preserve this public benefit. Utah's Constitution, statutes, and common law all support continued adherence to the public trust doctrine, suggesting that the state legislature has written an illegal law. Amending the Utah Lake Restoration Act to comply with the public trust doctrine, or repealing it altogether, will provide notice to would-be developers to construct their plans accordingly and safeguard against potential lawsuits against the state.

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INTRODUCTION

Utah Lake (the "Lake") is the largest freshwater lake in Utah[1]—the third driest state[2]—so reason would suggest that the Lake is also a cherished destination. But that is not so.[3] In fact, an alarming number of residents are either oblivious to the Lake or repulsed by its reputation as a scummy, polluted waterbody.[4] The population of the surrounding valley has grown steadily since the 1800s,[5] creating stressors on the Lake's natural ecology.[6] Though many indicators suggest that the Lake's condition is improving, the long-term health of the Lake depends on careful management.[7] Anxious to address this problem but limited on resources, the Utah Legislature developed a plan that would restore Utah Lake without draining taxpayer dollars.[8]

The Utah Lake Restoration Act (ULRA) was passed in 2018 and amended in 2022.[9] It creates a public-private partnership whereby a private entity can undertake the much-needed restoration activities and receive compensation in the form of state lands in and around Utah Lake.[10] In spite of the legislature's good intentions, the

1. *Utah Lake State Park*, UTAH DIV. OF NAT. RES., https://stateparks.utah.gov/parks/utah-lake/ (last visited Oct. 12, 2022).

2. *State That Receives the Least Amount of Rain*, WORLD ATLAS, https://www.worldatlas.com/articles/the-10-driest-states-in-the-united-states-of-america.html (last visited Oct. 12, 2022).

3. *See* Jim Rayburn, *Utah Lake: An Asset in Disguise?*, DESERET NEWS (Apr. 10, 1994, 12:00 AM), https://www.deseret.com/1994/4/10/19103274/utah-lake-an-asset-in-disguise; Radiowest, *The Past, Present and Future of Utah Lake: Part I*, KUER (Feb. 24, 2022, 2:30 PM), https://radiowest.kuer.org/show/radiowest/2022-02-24/the-past-present-and-future-of-utah-lake-part-1 ("Utah Lake is often disregarded by the hundreds of thousands of people who live near it.").

4. Rayburn, *supra* note 3; Radiowest, *supra* note 3.

5. UNITED STATES CENSUS, https://www.census.gov/quickfacts/utahcountyutah (last visited Oct. 12, 2022).

6. *See infra* Section I.A; *see also* Utah Lake Symposium, *Getting to Know the Utah Lake Ecosystem*, BYU, https://pws.byu.edu/utah-lake/about-utah-lake (last visited Oct. 12, 2022).

7. *See* Radiowest, *supra* note 3.

8. *See infra* Section I.B.

9. *See infra* Section I.B; UTAH CODE ANN. §§ 65A-15-101–202 (2018) (amended 2022) [hereinafter ULRA unamended]; UTAH CODE ANN. §§ 65A-15-101–202 (2022) [hereinafter ULRA].

10. ULRA §§ 101–102.

ULRA has met with strong public opposition because the plan fails to guarantee the sufficiency of restoration efforts.[11]

Since 2018, a private development has surfaced that epitomizes this concern.[12] Lake Restoration Solutions (LRS) alleges that it will provide restoration of Utah Lake in exchange for 18,000 acres of the lakebed,[13] nearly one-fifth of the surface area of the Lake.[14] LRS plans to dredge the Lake, build islands over the 18,000 acres, then develop a city with up to 500,000 people on top of them.[15] Scientists worry about this plan because of the potential negative impacts of such a large dredging project.[16] Local residents complain that, should the project become more expensive than planned,[17] or should LRS fail to deliver environmental benefits, the public will bear the costs of those failures.[18] Additionally, owners of downstream water rights worry about disruption to their water supply, noting that the plan to create a deeper lake does not increase useable water storage since the water distribution system relies on maintaining existing lake levels.[19]

But there is another significant concern underlying the ULRA's scheme. The ULRA allows for the privatization of the Lake, an

11. *See infra* Section I.B.

12. Brian Maffly, *Would Dredging Utah Lake Upset a Century of Peace Over Water Rights?*, SALT LAKE TRIB. (Mar. 28, 2022, 8:30 AM), https://www.sltrib.com/news/environment/2022/03/28/would-dredging-utah-lake/;John Bennion, *Arguments for Dredging Utah Lake Don't Hold Up*, SALT LAKE TRIB. (Apr. 7, 2022, 11:00 AM), https://www.sltrib.com/opinion/commentary/2022/04/07/john-bennion-arguments/; Tara Bishop, *Who Will Pay for Utah Lake to Be Destroyed?*, SALT LAKE TRIB. (Apr. 7, 2022, 11:36 AM), https://www.sltrib.com/opinion/commentary/2022/04/07/tara-bishop-who-will-pay/; Wes Davey, *A Lake Filled with Multi-million Dollar Homes Would Be an 'Unmitigated Disaster'*, SALT LAKE TRIB. (Apr. 10, 2022, 6:00 AM), https://www.sltrib.com/opinion/letters/2022/04/10/letter-lake-filled-with/; Richard Middleton, *Only Thing to Do with Lake Restoration Solutions' Sales Pitch: Turn Away*, SALT LAKE TRIB. (Apr. 13, 2022, 6:00 AM), https://www.sltrib.com/opinion/letters/2022/04/13/letter-only-thing-do-with/.

13. GEOSYNTEC CONSULTANTS, UTAH LAKE RESTORATION PROJECT PERMIT APPLICATION 4-1 to 4-3 (2021).

14. Utah Lake Symposium, *supra* note 6.

15. Carol-Lyn Jardine, *More Than 100 Scientists and Experts Speak Out Against Proposed Islands Development for Utah Lake*, CONSERVE UTAH VALLEY (Dec. 24, 2021), https://conserveutahvalley.org/more-than-100-scientists-and-experts-speak-out-against-proposed-islands-development-for-utah-lake/.

16. *Id.* Studies suggest that the Lake benefits from its shallow and silty composition because those conditions impede harmful algal blooms. *Id.*

17. Though the project is eight times larger than the Kansai Airport in Japan, currently the world's largest dredge and fill project, the developers market the project as costing much less. *Id.*

18. *Id.*; Bishop, *supra* note 12.

19. Maffly, *supra* note 12.

exchange that is almost certainly illegal according to the public trust doctrine.[20] A deeply rooted and often misunderstood legal principle, the public trust doctrine recognizes that navigable bodies of water are held in trust by a state "for the people of the State that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties."[21] Adopted from Roman and English common law, the American public trust doctrine recognizes that states, as sovereigns, should define the contours of their public trust doctrines so long as they do not violate its foundational premises.[22] This note seeks to clarify Utah's existing public trust doctrine, its legal foundation, and implications for the ULRA. It argues that while Utah has long recognized that private conveyances of public trust assets are possible,[23] the ULRA's unlimited license to dispose of land *in* Utah Lake goes too far.[24]

State statutes commit Utah to adhere to public trust tenets, and the language of the ULRA does not allow this statute to supersede these existing laws. The Utah Constitution also provides anchors for preserving the public trust doctrine and prevents the legislature from overriding public trust limitations through the ULRA.[25] Lastly, existing common law confirms that even states with a narrow public trust doctrine may not entirely alienate their trust duties.[26]

The 2022 updates to the ULRA increase government oversight of transfers, but the provision allowing private entities to own

20. Prior to its passage in 2018, Andrew Follett wrote on the constitutionality of the ULRA, pointing out that an act permitting large-scale privatization of lands underlying navigable waters most likely violates the public trust doctrine and environmental interests are a valid public trust consideration. Andrew Follett, *Bartering the Public Trust: Assessing the Constitutionality of the Utah Lake Restoration Act*, HINCKLEY J. POL. (2019). This note hopes to expand on his article by analyzing the ULRA's amendment and considering questions of constitutional and statutory interpretation. Both the ULRA and the initial proposal by LRS reference public trust "uses" or "benefits," discussing how restorative efforts will increase use by residents. But neither addresses the underlying public trust responsibility of not impeding access. ULRA § 103(5); LAKE RESTORATION SOLUTIONS, INC., UTAH LAKE RESTORATION PROJECT PROPOSAL, 100, 207–40 (2018).

21. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452 (1892).

22. *See infra* Part II.

23. *See, e.g.*, Colman v. Utah State Land Bd., 795 P.2d 622 (Utah 1990).

24. *See infra* Part III.

25. *See infra* Sections III.A–B.

26. *See infra* Section III.C.

portions of Utah Lake remains intact.[27] While the ULRA could conceivably comply with public trust principles if small transfers were made, the overall scheme of the Act and the specific proposal made by LRS suggest that the legislature intended to allow for the privatization of large amounts of public land. Because such a transfer would violate the public trust doctrine, this note argues that the ULRA requires further amendment or repeal.[28]

Part I provides historical background on Utah Lake and introduces the ULRA and its recent amendments. Part II outlines the American public trust doctrine and general trends in state public trust doctrines. Part III analyzes Utah's statutes, constitution, and common law to expose the underpinnings of Utah's Public Trust Doctrine and evaluate the validity of the ULRA accordingly.

I. TAKING A DEEP DIVE: BACKGROUND ON THE SITUATION AT UTAH LAKE

A. A Brief History of Utah Lake

Utah, a state known for its natural beauty,[29] vastly underutilizes and underappreciates its largest freshwater lake.[30] Until about 15,000 years ago, Utah Lake was a small part of a vast inland sea called Lake Bonneville.[31] A massive flood, the second largest known in geological history,[32] resulted in a much smaller lake and a drier climate that would eventually leave only Utah Lake, the Great Salt Lake, and Sevier Lake.[33]

The newly habitable valley with its abundant natural resources would serve as home to various groups over the following centuries.[34] Relatively little is known of the earliest humans to pass through the area, and historians refer to them only as the Pre-

27. ULRA § 201(1)(a), (3).

28. *See infra* Part III.

29. *Parks & Outdoors*, VISIT UTAH, https://www.visitutah.com/places-to-go/parks-outdoors (last visited Oct 12, 2022).

30. Rayburn, *supra* note 3; Radiowest, *supra* note 3.

31. Utah Lake Symposium, *supra* note 6.

32. *Id.*

33. *Id.*

34. *Id.*

Clovis, Clovis, and Fremont peoples.[35] Historical evidence suggests that more recently, ancestors of the Shoshone, Paiute, Navajo, and Apache peoples visited the area until the end of the 1800s[36]—the Tumpanawach clan being the valley's most predominant presence.[37] The first record of Europeans near Utah Lake was in 1604, but non-Native Americans did not enjoy a heavy presence until the fur trade came to the area from 1825–1840.[38] When Latter-day Saint pioneers settled in Utah Valley, they competed for resources, leading to years of alternating conflict and peace between Native and non-Native groups.[39] Lasting peace only came after the forced migration of the Ute Nation onto the Uintah Reservation beginning in 1865.[40]

Over the next century, water diversions, overfishing, and pollution from industrial and agricultural runoff damaged the Lake's biodiversity and water quality.[41] In the last twenty years, Utah has acknowledged the problem and tried to repair ecological damage to the Lake with the most intense efforts beginning in 2007 with the creation of the Utah Lake Commission.[42] Current projects include water quality studies, beach improvements, removal of invasive carp species, mitigation of invasive phragmites,[43] recovery of the June Sucker (a recently down-listed but still threatened species),[44] and restoration of the Provo River Delta.[45] In spite of these efforts, the overall condition of the Lake still faces challenges,

35. *Id.* Although not the focus of this paper, a discussion about ownership of an area originally inhabited by Native Americans naturally stirs up questions of true sovereignty since these lands only became a U.S. territory, and then a state, after the forcible removal of indigenous groups. *See* Rebecca Tsosie, *The Conflict Between the "Public Trust" and the "Indian Trust" Doctrines: Federal Public Land Policy and Native Nations*, 39 TULSA L. REV. 271 (2003).

36. Utah Lake Symposium., *supra* note 6.

37. Clifford Duncan, *The Northern Utes of Utah*, *in* A HISTORY OF UTAH'S AMERICAN INDIANS 167, 177 (Forrest S. Cuch ed., 2000).

38. *Id.* at 179–81.

39. *Id.* at 187.

40. *Id.* at 189–91.

41. Utah Lake Symposium., *supra* note 6.

42. *Id.* The Commission will transform into the Utah Lake Authority after the passage of Utah H.B. 232 in 2022.

43. *Utah Lake Improvement & Restoration Projects*, UTAH LAKE COMM'N, https://utahlake.org/projects/#1542229044030-5c755045-59ee (last visited Oct. 12, 2022).

44. JUNE SUCKER RECOVERY IMPLEMENTATION PROGRAM, https://junesuckerrecovery.org/ (last visited Oct. 12, 2022).

45. PROVO RIVER DELTA, https://www.provoriverdelta.us/ (last visited Oct. 12, 2022).

including reputational damage.[46] Decades of mismanagement have left the Lake with fewer recreational opportunities than were available a century ago, and residents generally ignore the Lake or regard it with disdain.[47]

B. The Utah Lake Restoration Act

Recognizing the wasted potential of such a large waterbody, the Utah Legislature attempted to revitalize the Lake through a law passed in 2018, the Utah Lake Restoration Act (ULRA).[48] Acknowledging the ecological challenges that the Lake faces, but hoping to avoid substantial government expenditures, the ULRA creates a scheme through which the state can use public lands to "compensate" private actors for comprehensive restoration of the Lake.[49] The original version of the ULRA allowed the Division of Forestry, Fire, and State Lands (the FFSL Division) to "dispose of appropriately available state land in and around Utah Lake as compensation" for undertaking projects that purport to provide comprehensive restoration of the Lake according to eleven criteria.[50]

Yet the public and environmental interest groups reacted strongly, citing concerns that the ULRA provided no safeguards to keep developers from profiting from the land without actually providing the promised restoration.[51] To address these concerns, the legislature amended the ULRA during the 2022 general session.[52]

Previously, the FFSL Division could unilaterally dispose of public lands; now, the legislature and governor must agree to the exchange through a concurring resolution.[53] The 2022 changes better guarantee realized outcomes by adding the language that the concurring resolution can only pass where "the restoration project

46. *See generally* Rayburn, *supra* note 3; Radiowest, *supra* note 3; Utah Lake Symposium, *supra* note 6.

47. *See generally* Rayburn, *supra* note 3; Radiowest, *supra* note 3; Utah Lake Symposium, *supra* note 6.

48. ULRA unamended §§ 101–202.

49. ULRA unamended § 201(1).

50. ULRA unamended § 201(1)(a)–(k).

51. Kyle Dunphey, *Opposition Mounting Against Utah Lake Project, Developers Say 'Trust Is Gained Over Time*,' DESERET NEWS (Feb. 12, 2022, 9:00 PM), https://www.deseret.com/utah/2022/2/12/22925651/utah-lake-islands-project-pushback-lawmakers-utah-county-towns-lake-restoration-vineyard.

52. ULRA.

53. *Id.* § 201(1)(a), (3).

will accomplish the objectives listed."[54] And the amended version of the ULRA enhances government oversight by allowing the FFSL Division to create standards and criteria against which the legislature and governor can judge if the restoration goals are attained.[55]

Interestingly, the amended version requires that any disposal of land be "fiscally sound," "constitutionally sound," and "legal,"[56] but makes no changes to the language that allows the disposal of land *in* Utah Lake.[57] So, while the concerns of the environmental interest groups may be assuaged by the 2022 updates, the public trust issues remain.

II. STILL WATERS RUN DEEP: THE AMERICAN PUBLIC TRUST DOCTRINE

Though the government is generally not shy about using its property and resources to exact policy goals, "the nature of property rights in rivers, the sea and the seashore" are categorically different.[58] Even early Roman and English common law recognized that "certain interests, such as navigation and fishing, [ought] to be preserved for the benefit of the public" and "property used for those purposes [are] distinguished from the general public property which the sovereign [can] routinely grant to private owners."[59] American common law adopted this understanding, canonizing the basic tenets of the American public trust doctrine in *Illinois Central Railroad v. Illinois*.[60]

In the 1840s, the city of Chicago faced several problems in Lake Michigan, including sandbars that disrupted navigation and erosion that threatened property damage.[61] Though the city attempted to build a breakwater to combat these problems, it failed

54. *Id.* § 201(3)(b)(i).

55. *Id.* § 201(4).

56. *Id.* § 201(3)(b)(ii)(A)–(B).

57. *Id.* § 201(1)(a).

58. Joseph L. Sax, *The Public Trust Doctrine in Natural Resource Law: Effective Judicial Intervention*, 68 MICH. L. REV. 475 (1970).

59. *Id.*

60. 146 U.S. 387 (1892). *See* Sax, *supra* note 58, at 478–85, 89 (calling *Illinois Central* the lodestar of American Public Trust Law); *see also* Crystal S. Chase, *The Illinois Central Public Trust Doctrine and Federal Common Law: An Unconventional View*, 16 HASTINGS ENV'T. L.J. 113, 151 (2010); Joseph D. Kearney & Thomas W. Merrill, *The Origins of the American Public Trust Doctrine: What Really Happened in Illinois Central*, 71 UNIV. CHIC. L. REV. 799, 800 (2004).

61. Chase, *supra* note 60, at 126.

multiple times.[62] When the railroad proposed that it would pay for and construct a breakwater in exchange for harbor property, the city and the state welcomed the solution, granting the railroad control of the shore and lakebed through city ordinances and the Lake Front Act.[63] Various property rights questions emerged in the 1860s, so that by 1867, "legal title to the Chicago lakefront was deeply vexed."[64] In 1883, the state brought suit against the Illinois Central Railroad Company to clarify ownership of submerged and filled portions of the lakebed of Lake Michigan to which the railroad, city, and state all laid claim.[65] Ultimately, the court found that the state of Illinois was the proper owner of the lakebed, so though the state had delegated certain powers to the city and the railroad for a time, it retained the right to revoke them.[66]

Ultimately, *Illinois Central* squarely established a state's title to submerged lands under navigable waters "by virtue of its sovereign power" and created a "general restraint on alienation" of that ownership.[67] While this restraint is not absolute—a state may transfer property rights where the disposal would "promot[e] the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining"—states are cautioned against transferring rights that abdicate its trust responsibilities.[68]

Subsequent federal case law provides "states a wide berth to expand the doctrine's protection beyond a federal minimum"[69] but has never indicated that a state may "abrogate the doctrine entirely," and no state has yet tried.[70] Thus, each state's application of the public trust doctrine may look quite different, and state-level

62. *Id.*

63. *Id.*

64. Kearney & Merrill, *supra* note 60, at 836.

65. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 433 (1892).

66. *Id.* at 453–54, 63.

67. Chase, *supra* note 60, at 131, 150.

68. *Illinois Central*, 146 U.S. at 453.

69. Alexandra B. Klass, *Modern Public Trust Principles: Recognizing Rights and Integrating Standards*, 82 NOTRE DAME L. REV. 699, 705 (2006).

70. *Id.* at 705.

analysis is generally necessary to understand public trust decisions in a given state.[71]

State public trust doctrines typically include parameters guiding the following components:

> (1) the beds and banks of waters that are subject to state/public ownership; (2) the line or lines dividing private from public title in those submerged lands; (3) the waters subject to public use rights; (4) the line or lines in those waters that mark the limit of public use rights; and (5) the public uses that the doctrine will protect.[72]

States then rely on various legal theories to preserve public access.[73] Some states treat the public trust as a public easement, ensuring public access to public trust lands.[74] In others, the public trust implies a restrictive servitude that prevents constitutional takings claims when states restrict private actions on public trust lands.[75] Some states have relied on a presumption against trust termination to ensure proper statutory drafting and interpretation.[76] Or sometimes, states simply require that administrative decisions be justified.[77]

In general, the eastern and western halves of the U.S. respectively follow similar patterns in crafting their public trust doctrines because of general trends in water availability.[78] Eastern states are generally more concerned with coastal rights than the rights of freshwater bodies and often apply different sets of rules to each.[79] They are also more likely to rely on English common law ebb-and-flow principles because they became states in closer proximity to the colonial period.[80]

71. Robin Kundis Craig, *A Comparative Guide to the Western States' Public Trust Doctrines: Public Values, Private Rights, and the Evolution Toward an Ecological Public Trust*, 37 ECOLOGY L. Q. 53, 58 (2010).

72. *Id.* at 56.

73. Michael C. Blumm, *Public Property and the Democratization of Western Water Law: A Modern View of the Public Trust Doctrine*, 19 ENV'T. L. 573, 578 (1989).

74. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. The western states include Alaska, Arizona, California, Colorado, Hawaii, Idaho, Kansas, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington, and Wyoming. Craig, *supra* note 71, at 56.

79. *Id.*

80. *Id.* ("Ebb-and-flow" refers to waters that are affected by tides).

Western states, on the other hand, more often rely on U.S. Supreme Court precedent since many became states after certain landmark decisions.[81] The western states' relative lack of coastline, more arid climates, and tendency towards using prior appropriation[82] water rights (also a corollary of drier climates) have led to greater struggles between private water rights and public water usage.[83]

This tension generally leads to two outcomes.[84] States with more economic incentives to ensure public use, like Hawaii and California, develop more robust public trust doctrines.[85] States with stronger traditions of private use, like Arizona or Colorado, are less likely to expand the public trust doctrine beyond what is required.[86]

III. PADDLING ITS OWN CANOE: UTAH'S PUBLIC TRUST DOCTRINE AS APPLIED TO THE ULRA

Utah fits many of the patterns followed by western states.[87] Utah has a water rights system of prior appropriation[88] and vests the state with ownership of all waters[89] leading to an interesting overlap of property rights in navigable waterbodies where the state owns the water and the underlying land.[90] Utah defines navigability where a "waterway is 'generally and commonly useful to some purpose of trade or agriculture'" or as a "public highway of

81. *Id.* (namely *Illinois Central* and its precursors).

82. "Prior appropriation" refers to water rights that convey a first-in-time, first-in-right mentality. *Id.*

83. *Id.* at 57. The prior appropriation system generally leads states to declare public ownership of fresh water. These states are then able to separately apply public trust principles to the submerged land of navigable waters and the water itself (navigable or not).

84. *Id.* at 71–72.

85. *Id.* at 58, 71–72.

86. *Id.* at 71–72.

87. *See id.* at 71, 182–89.

88. *Id.* at 182.

89. UTAH CODE ANN. § 73-1-5 (2022). "Public ownership is founded on the principle that water, a scarce and essential resource in this area of the country, is indispensable to the welfare of all people; and the State must therefore assume the responsibility of allocating the use of water for the benefit and welfare of the people of the State as a whole." J.J.N.P. Co. v. Utah, 655 P.2d 1133, 1136 (Utah 1982).

90. "Although there is a logical nexus between the management of the bed of water bodies and the quality or quantity of overlying waters, the issue of sovereign lands is ultimately one of land use and title, not necessarily water law, rights, or policy." Follett, *supra* note 20, at 2.

transportation."[91] Navigable in fact makes a waterway navigable in law, and the time for determining a waterway's navigability is at the time of statehood.[92] Under this definition, Utah Lake is unquestionably a navigable waterway under the public trust.[93]

Yet many contours of Utah's public trust doctrine remain untested.[94] These contours become critical when analyzing the validity of the ULRA and its provision to "dispos[e] of appropriately available public land in and around Utah Lake as compensation for the comprehensive restoration of Utah Lake."[95] As currently written, this compensation scheme violates the state's public trust law, which begs the question, can the legislature do so? Regardless of the legal underpinnings of Utah's public trust doctrine, the answer seems to be 'no' so long as the disposal represents an abdication of control over trust assets.

Conceivably, the state legislature only meant to create the means to dispose of small parcels of the lakebed or thought that compensation could come mostly from lands *around* the Lake, rather than *in* the Lake. Such arrangements likely would not interfere with the public trust. But there is good reason to think that the legislature intended for the ULRA to allow large grants of land *in* the Lake.

First, the transfer of land is meant to compensate the private partner for "comprehensive restoration."[96] As discussed, the needed restoration is so costly that the state chose to create a public-private partnership, rather than undertake the burden itself. If the project was too expensive for the state, then a disposal meant to provide compensation would require a fairly significant portion of land.

Second, if the transaction requires a large amount of land, the state likely cannot provide it from lands *around* Utah Lake.[97] While the state owns some land in Utah County, almost none of it is lakefront.[98] Most lakefront property is already privately owned,

91. Utah Stream Access Coal. v. VR Acquisitions, LLC, 439 P.3d 593, 601 (Utah 2019) (quoting UTAH CODE ANN. § 73-29-102(4)).

92. Utah v. United States, 403 U.S. 9, 9–10 (1971).

93. State v. Rolio, 262 P. 987, 989–90, 992 (Utah 1927).

94. *See* Craig, *supra* note 71, at 182–89.

95. ULRA § 201(1)(a).

96. *Id.*

97. *Id.* (emphasis added).

98. GIS DIVISION, UTAH COUNTY ATLAS 121 (2015), https://www.utahcounty.gov/OnlineServices/maps/UtahCounty2015Atlas.pdf.

with a few parcels held by the surrounding cities or the federal government.[99] Given the current breakdown of property ownership, the state would have a difficult time providing the compensation promised without relying on land *in* Utah Lake.

Third, the ULRA was originally written with large-scale development in mind. LRS was actively promoting its activities in 2018, and the legislature was fully aware and supportive of the plan to build 20,000 acres of dredged islands for as many as 500,000 people.[100] Given the link between the timing of the legislation and the only development proposal at the time, the logical assumption is that the ULRA not only allows, but intends, for large-scale privatization of land *in* Utah Lake.

Even if a private entity successfully completes all the restoration tasks listed by the ULRA and increases public use and enjoyment of Utah Lake, the public's resulting loss of a large segment of the Lake would violate the public trust. The public trust requires the state to serve the public interest in perpetuity, but these obligations are impossible to maintain unless the state maintains control of the lakebed. As soon as the state privatizes the underlying lakebed, it loses its ability to guarantee the continued public use and enjoyment of the navigable waterway and abandons its trust responsibilities.

While the narrowest application of ULRA does not inherently violate the public trust doctrine, any practical application will require a disposal of lands underlying navigable waters that runs into conflict with the public trust doctrine. Working from this premise, the following sections explain how the state's statutes, constitution, and common law reject the ULRA's attempt to abdicate the state from its public trust responsibilities.

A. Utah's Public Trust Doctrine Under Prior Statute

Utah statutes designate lands implicated by the public trust doctrine as "sovereign lands" and recognizes that "there is reserved to the public the right of access to all lands owned by the state, including those lands lying below the official government meander line . . . of navigable waters, for the purpose of hunting, trapping, or fishing."[101] Elsewhere, the code identifies sovereign lands as those

99. *Id.*

100. *Utah Lake*, CONSERVE UTAH VALLEY https://conserveutahvalley.org/projects/utah-lake/ (last visited Oct. 12, 2022).

101. UTAH CODE ANN. § 23-21-4(1) (2022).

"lands lying below the ordinary high water mark of navigable bodies of water at the date of statehood and owned by the state by virtue of its sovereignty."[102]

The code also describes proper management of sovereign lands. The FFSL Division has authority to manage these lands and "may exchange, sell, or lease sovereign lands *but only in the quantities and for the purposes as serve the public interest and do not interfere with the public trust*."[103]

As a navigable body of water, all of these statutes apply to Utah Lake and thus to the ULRA.[104] But, as discussed, the ULRA does not provide adequate safeguards to ensure that disposal of land in Utah Lake meets public trust requirements.

Some might argue that legislation is generally subject to change by the legislature, so the ULRA is legal if read to supersede these laws. But this interpretation is unlikely based on the statute's own text.

The canons of statutory interpretation include an assumption against implied repeal. This canon states that "[s]tatutory interpretation . . . is a holistic endeavor," so a statute "that may seem ambiguous in isolation is often clarified by . . . the rest of the law."[105] Knowing this to be the case, legislators should expressly indicate that a new statute controls.[106] Courts will apply a rule favoring the newer law over the older law only where the differences are irreconcilable.[107]

But the ULRA makes no explicit indication of superseding anything and instead plainly states that any disposal of sovereign lands must be "constitutionally sound and legal."[108] This phrase

102. *Id.* § 65A-1-1(6).

103. *Id.* § 65A-1-1(5), § 65A-2-5, § 65A-10-1(1) (emphasis added). When areas of Utah Code are facially at odds with the public trust, the statutes generally clarify the preeminence of the public trust doctrine. For example, the code directs the FFSL Division to "administer state lands . . . using multiple-use sustained yield principles," but accompanying commentary says that "[t]rust obligations take priority and must first be met before consideration can be given to multiple use-sustained yield principles." *Id.* § 65A-2-1.

104. State v. Rolio, 262 P. 987, 989–90, 992 (Utah 1927).

105. United Sav. Ass'n of Tex. v. Timbers of Inwood Forest Assocs., 484 U.S. 365, 371 (1988).

106. WILLIAM N. ESKRIDGE JR. ET AL, LEGISLATION AND REGULATION: STATUTES AND THE CREATION OF PUBLIC POLICY 527 (5th ed. 2014).

107. LARRY M. EIG, STATUTORY INTERPRETATION: GENERAL PRINCIPLES AND RECENT TRENDS 31 (2014).

108. ULRA § 101(3)(b)(ii)(B).

seems to lead to one conclusion—that the legislature intended the ULRA to harmonize with existing statutes.

Though understanding the intent of the legislature is important, the statutory interpretation may be less important in light of the constitutional underpinnings of Utah's Public Trust Doctrine.

B. A Constitutional Theory for Utah's Public Trust Doctrine

Article XX, section 1 of the Utah Constitution declares that "[a]ll lands of the State that have been, or may hereafter be granted to the State . . . are declared to be the public lands of the State; and shall be held in trust for the people, to be disposed of as may be provided by law, *for the respective purposes for which they have been or may be granted, donated, devised or otherwise acquired*."[109]

Academics generally consider this language vague enough that they argue that Article XX does not explicitly create a public trust duty.[110] But the Utah judiciary has the final word on interpretation of its Constitution.[111] In *Utah Stream Access Coalition v. VR Acquisitions*, the court grapples with an issue over an easement in *non*-navigable waters but provides insightful dicta on Article XX in the process.[112] The court suggests that it would be persuaded by originalist arguments that illuminate the meaning of Article XX's trust obligations and would be more likely to embed a property right within Article XX where a "19th-century basis exists."[113] That basis seems to exist in the equal-footing doctrine.

The equal-footing doctrine is an important 19th-century framework through which Article XX should be understood.[114] In a series of 19th-century cases, the courts recognized that states are entitled to "hold the absolute right to all their navigable waters and the soils under them" as a result of their co-equal sovereignty with the federal government.[115] The thirteen original states maintained this right upon entry into the Union, and the Supreme Court

109. UTAH CONST. art. XX, § 1 (emphasis added).

110. *See, e.g.*, Craig, *supra* note 71, at 183.

111. UTAH CONST. art. VIII, § 2.

112. Utah Stream Access Coal. v. VR Acquisitions, LLC, 439 P.3d 593 (Utah 2019).

113. *Id.* at 597, 606.

114. PPL Mont., LLC v. Montana, 565 U.S. 576, 590–91 (2012) (quoting Martin v. Lessee of Waddell, 41 U.S. 367, 410 (1842)).

115. *Id.* at 590 (citing Carson v. Blazer, 2 Binn. 475 (Pa. 1810)); Ex'rs of Cates v. Wadlington, 12 S. C. L. 580 (1822); Wilson v. Forbes, 13 N. C. 30 (1828); Bullock v. Wilson, 2 Port. 436 (Ala. 1835); Elder v. Burrus, 25 Tenn. 358 (1845)).

determined through another series of nineteenth-century cases that the Constitution guaranteed this right for all states later admitted.[116] Thus, Utah acquired title to the lands underlying navigable waters, including Utah Lake, by virtue of its statehood.[117]

According to Article XX, the "respective purposes" for which the state receives lands matters. Utah acquired title to Utah Lake by virtue of its sovereignty and the Lake's attributes that make it a navigable waterway. Because of Article XX, this special designation is not one that can be shed. This fact becomes all the more important when examined through the lens of another important nineteenth-century precedent established in *Illinois Central*.

As discussed previously, *Illinois Central* solidified federal understanding of public trust obligations.[118] That case concluded that the sovereign acts as trustee, preserving navigable waters and their beneficial uses for public benefit.[119] Private conveyances are generally disfavored but may occur where it would promote public use and does not substantially interfere with public enjoyment or represent a full abdication of trust responsibilities.[120]

Importantly, this case was decided in 1892,[121] and Utah drafted and ratified its constitution in 1895.[122] When Utah received title to its sovereign lands based on the equal footing doctrine, the nature of the trust obligations attached were well understood, further entrenching the public trust doctrine in a reading of Article XX. This line of reasoning tracks with the Supreme Court's tendency to defer to the doctrine even though the Court acknowledges that the scope of the trust is a matter of state law.[123]

With a constitutional foundation, no Utah statute, not even the ULRA, can fully dismantle observance of the public trust doctrine. And the legislative drafters of the ULRA allude to an awareness of this limitation. The ULRA requires that all disposal of land be

116. *Id.* at 591 (citing Lessee of Pollard v. Hagan, 44 U.S. 212, (1845)); Knight v. United States Land Assn., 142 U.S. 161, 183, (1891); Shively v. Bowlby, 152 U.S. 1, 26-31 (1894).

117. *See id.*

118. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 452–53 (1892).

119. *Id.* at 452.

120. *Id.* at 452–53.

121. *Id.* at 387.

122. UTAH DIVISION OF ARCHIVES AND RECORD SERVICES, ROAD TO STATEHOOD, https://archives.utah.gov/research/exhibits/Statehood/conintro.htm (last visited Oct. 12, 2022).

123. Klass, *supra* note 69, at 729.

"constitutionally sound."[124] American democracy recognizes that constitutions preempt statutes, so all statutes must be constitutionally sound. But judicial interpretation generally assumes a presumption against surplus language or the inclusion of words that have no real purpose.[125] The fact that the ULRA explicitly states this requirement suggests that the legislature was wary of encroaching on the requirements of Article XX.

C. Judicial Guidance on Utah's Public Trust Doctrine

But how to properly interpret the language of the ULRA, other state statutes regarding the public trust, and Article XX is ultimately a question for the state judiciary, the branch designated to interpret the law.[126] As such, there is value in taking notice of the guidance that the Utah Supreme Court has already offered. Though Utah has not before encountered a situation exactly like the one presented by the ULRA, *Colman v. Utah State Land Board* presents the most analogous example.[127]

In *Colman*, the Great Salt Lake was experiencing much higher-than-normal water levels due to increased rainfall and flooding.[128] The high water levels threatened the railroad causeway that ran across the lake from east to west.[129] To avert severe damage to the railroad, the legislature authorized an engineered breach in the causeway to allow pent up waters in the lake's southern section to flow into the northern section.[130] The resulting flow through the engineered breach ruined a lessor's underwater brine canal, and the lessor sued for damages.[131] Since the brine canal was built on a submerged lakebed, Utah's public trust doctrine became relevant to determining the lessor's claim on the canal.[132]

Colman is notable because it provides one of the few instances when the Utah Supreme Court discusses the conditions under which lands submerged under navigable waters can be sold or

124. ULRA § 201(3)(b)(ii)(B).
125. ESKRIDGE JR. ET AL., *supra* note 106, at 677.
126. UTAH CONST. art. VIII, § 2.
127. Colman v. Utah State Land Bd., 795 P.2d 622 (Utah 1990).
128. *Id.* at 623.
129. *See id.*
130. *See id.*
131. *Id.* at 624.
132. *Id.* at 635–36.

leased to private entities.[133] The court affirms that "[t]he essence of [the public trust] doctrine is that navigable waters should not be given without restriction to private parties."[134] The trust "cannot be alienated, except . . . in the improvement of the interest thus held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining."[135] The court stops short of expressly deciding whether the lease for the brine canal was appropriate—deciding the case on other grounds—but the court does say that "there is nothing to show that Colman's canal impaired the public interest in any way at the time the state granted him the right to conduct his operation."[136] *Colman* seems to mirror the two exceptions laid out in *Illinois Central*.[137]

In *Utah Stream Access Coalition v. Orange Street Development*, a case concerning public access to a section of the Weber River, Justice Durham stresses that the state cannot abdicate its role as trustee.[138] The "State cannot have its cake and eat it too" by accepting title to the land at statehood and then rejecting the responsibility that comes with it.[139] The public trust creates more than a right of sovereign authority over lands under navigable waters but an obligation too. In other words, the public trust allows the state "to define, line up, shift, emphasize, or mute elements of the public interest as it attempts to come to balanced and actionable land management solutions for the benefit of the public, but it alone must do the weighing."[140]

Yet the ULRA potentially violates precedent from both of these cases. Because the ULRA allows the privatization of the lakebed, the state loses control over how those lands are managed in the future. Though the ULRA assumes that the exchange comes with many public benefits, the loss of control is a step too far. Even a relatively small disposal of land could leave a private party with superior decision-making powers over the use of the land—a result not permitted by the public trust doctrine. And as discussed in Part

133. *Id.*

134. *Id.* at 635.

135. *Id.* (quoting Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 455–56 (1892) (emphasis removed)).

136. *Id.* at 636.

137. Ill. Cent. R.R. Co. v. Illinois, 146 U.S. 387, 453 (1892).

138. Utah Stream Access Coal. v. Orange St. Dev., 416 P.3d 553, 562, 564 (Utah 2017) (Durham, J., concurring in relevant part and dissenting in part).

139. *Id.* at 564.

140. Follett, *supra* note 20, at 5.

III, the ULRA most likely would require a large disposal of land to fulfill its promise of compensation.

These conclusions are mirrored by other states in the region.[141] For example, in 1985, Arizona state officials began to assert state ownership of the land underneath riverbeds in a concerted effort.[142] The legislature responded by passing a law that "substantially relinquish[ed] the state's interest in such lands," but the Court of Appeals of Arizona found that the law violated the public trust.[143] Though this court relied on language unique to the Arizona Constitution, it also grounded its decision in the equal footing doctrine and the trust relationship that originated at statehood, concluding that the legislature could not altogether do away with the public trust doctrine.[144] Arizona reaffirmed these holdings in another case, stating that "[t]he public trust doctrine is a constitutional limitation on legislative power to give away resources held by the State in trust for its people."[145]

The Idaho Supreme Court relied on a similar understanding of public trust obligations even where it allowed a state agency to make a private conveyance of lands underlying navigable waters.[146] The state granted a permit of encroachment to a private yacht club in the bay of a navigable lake, and the court declined to reject the permit.[147] The court reasoned that this particular grant of property rights did not violate the public trust because it did not place the public trust asset beyond the control of the state, the docking facilities would accommodate navigation on the lake, and the encroachment only impeded access to .01% of the lake's area.[148] Though the permit was allowed, the court emphasized that the grant "remains subject to the public trust" and "the state is not

141. *Id*. For another example of a state's rejection of a plan to convey private rights to sovereign lands, see Andrew Follet's review of *Lake Michigan Federation v. United States Army Corps of Engineers*. Follett, *supra* note 20, at 7–8.

142. Ariz. Ctr. for L. in Pub. Interest v. Hassell, 837 P.2d 158, 161 (Ariz. Ct. App. 1991). Arizona may be the first state to push the limits of the public trust doctrine to this degree. Klass, *supra* note 69, at 729.

143. *Hassell*, 837 P.2d at 161, 174 (citing ARIZ. REV. STAT. ANN. §§ 12-510, 12-529, 37-1101–08).

144. *Id.* at 167–68.

145. San Carlos Apache Tribe v. Superior Ct., 972 P.2d 179, 199 (Ariz. 1999).

146. Kootenai Env't. All. v. Panhandle Yacht Club, 671 P.2d 1085 (Idaho 1983).

147. *Id.* at 1087, 1096.

148. *Id.* at 1087, 1094.

precluded from determining in the future that this conveyance is no longer compatible with the public trust."[149]

Though the public trust falls squarely in state law, these examples are informative. Courts view the public trust doctrine as something embedded into the lands themselves, and Utah's courts are unlikely to rebel against this tradition. No state can fully abdicate its public trust obligations. If Utah seeks to dispose of sovereign lands and the plan represents an abdication of public trust duties, it most likely will fail to meet scrutiny.

CONCLUSION

The ULRA, as currently constructed, does not prevent compensation of land in and around Utah Lake that would violate the fundamental tenets of the public trust doctrine. Without further amendment of the language of the ULRA or its total repeal, the state is at risk of encouraging developers to pursue plans for Utah Lake that will ultimately be found illegal.[150]

The legislature has two options as it reviews the ULRA. It could change the compensation scheme and offer state lands that are not bound by the public trust doctrine. Private entities are not likely to be enticed if the offering is not sufficiently appealing, but Utah has many valuable public lands and natural resources that make this option possible.

As an alternative, the legislature can repeal the ULRA and recognize that it will have to seek out other solutions to restore the ecological health of Utah Lake. Based on the impressive progress made by government agencies and private interests in the last few decades, this option may be the more desirable and plausible avenue.

As part of Utah's sovereign lands, Utah Lake affords the state certain privileges—title to it by right of sovereignty—and certain responsibilities—a duty to administer the Lake according to public trust principles. The ULRA may have been a creative way to create

149. *Id.* at 1094.

150. Recent events led the Utah Office of the Attorney General to consider the question of the legality of the proposal made by LRS. State land managers announced that privatizing the lakebed "would run afoul of the state's duty to manage such land in the 'public trust.'" While this announcement presents a particular hurdle to the LRS proposal, the ULRA continues to present a threat to Utah Lake so long as it remains law. Brian Maffley, *The Utah Lake Dredging Proposal Is Not Legal, Officials Tell Lawmakers*, SALT LAKE TRIB. (Aug. 17, 2022, 2:51 PM), https://www.sltrib.com/news/environment/2022/08/17/utah-lake-dredging-proposal-is/.

a public-private partnership to restore the ecological qualities of the lake with lower upfront costs to taxpayers, but it does not acknowledge the public trust constraints under which it must operate. As the state legislature continues to pursue solutions, one point is clear. Utah Lake is a beautiful public resource that deserves the continued efforts of state and private actors to ensure its continued value to the state.